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THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

SEP 30 2005

REGENESIS CORPORATION  
1994 Maple Street  
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002  
Regenesi Corporation  
West Hopkinton

WMC NO.: 05-09-WMC  
05-10-WMC  
05-11-WMC

APPEAL OF LICENSE  
REVOCATION

DES DOCKET NO. 04-010

**OPPOSITION OF APPELLANT/INTERVENOR CFNH  
TO MOTION BY REGENESIS CORPORATION FOR INTERLOCUTORY  
TRANSFER WITHOUT RULING TO THE SUPREME COURT**

The Appellant and Intervenor, Citizens for a Future New Hampshire ("CFNH"), by and through its attorneys, Anderson & Kreiger LLP, opposes the Motion by Regenesi Corporation for Interlocutory Transfer Without Ruling to the Supreme Court ("Motion"), for the following reasons:

1. The Motion would deprive the Waste Management Council ("Council") of its statutory mandate and authority to decide these appeals from a decision of the New Hampshire Department of Environmental Services ("DES") presiding officer. As the Council knows, in each case, the losing party must appeal the presiding officer's decision to the Council pursuant to RSA § 149-M:8, which provides:

Administrative appeals from decisions of the **department** made under provisions of this chapter *shall be heard by the waste management counsel* under RSA 21-O:9, V.

(Emphasis added).<sup>1</sup> To grant the Motion would make the Council's role meaningless. The need

<sup>1</sup> A "department decision" is:

to preserve and exercise the Council's decision-making power is enough to require denial of the Motion. Should the Council need more information, CFNH provides the following particulars:

2. In this matter, CFNH appeals the "Decision on Proposed Revocation of Solid Waste Permit," issued by Presiding Officer Michael J. Walls of the DES on June 23, 2005. In the Decision, Presiding Officer Walls revoked Solid Waste Permit No. DES-SW-SP-002 (the "Permit") on certain grounds, but erroneously failed to determine that Bio Energy/Regenesis (the "Applicant") and their officials lack the reliability and integrity to serve as solid waste licensees. His revocation is therefore "without prejudice" in the legal sense of that phrase, because it leaves open the possibility of Regenesis officials' reapplying for a solid waste permit and potentially operating a facility that will involve the transport, storage, incineration and generation of thousands of tons of solid waste containing hazardous material and that will be the largest source of lead emissions to the air in New Hampshire – posing a significant threat to public health and the environment. He should have issued a decision "with prejudice," which would preclude further applications by the officials who lack the requisite integrity and reliability. In that regard, Presiding Officer Walls also erred in related respects, including reliance upon an "advice of counsel" argument that the Applicant waived (if it made it at all) and which the record did not substantiate, as well as denial of discovery and questioning into issues relating to the key issue of the Applicant's reliability and integrity.

3. Presiding Officer Walls also erred in concluding that Bio Energy and/or Regenesis provided proper notice to the public – including one or more members of CFNH – pursuant to

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the final action on an application, petition, order or request taken by the commissioner or any department official who has statutory authority to make such final decision or to whom the commissioner has properly delegated the authority to take such final action.

RSA § 21-O:14, I. In this statute, the "department" is the Department of Environmental Services. RSA § 149-M:4.

Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to their corporate affiliates and not to abutters to those affiliates.

4. As this short summary shows, the issues before this Council are not limited to legal questions, as the Applicant implies. Rather, a hearing before the Council "shall be conducted in accordance with the provisions of RSA 541-A [the Administrative Procedure Act] governing adjudicative proceedings." RSA § 21-O:14, II. Pursuant to RSA § 541-A:30-a, I and RSA § 21-O:14, IV, the DES has promulgated regulations outlining procedural rules for the Council. See Env-WMC 200 et seq. The burden of proof in an administrative appeal before the Council is on the appellant, who must prove "**by a preponderance of the evidence**, that the decision that is being appealed was: (1) Contrary to case law, statute, or rules; or (2) Arbitrary and capricious." Env-WMC 205.14(a)[emphasis added]. It is the Waste Management Council's decision that the Supreme Court reviews, under standards applicable to agency fact-finding. In Re Appeal of Working on Waste, 133 N.H. 312 (1990). If the Council concludes that there was an error in the underlying DES decision, or that evidence was wrongly excluded or considered, then it will need to fashion a remedy that respects the hearing officer's role as the only decision-maker to hear the evidence first-hand, such as a directive to Presiding Officer Walls to hear additional evidence, or to remove other evidence from consideration. That means further fact-oriented proceedings, not decision of legal issues, to be completed prior to any judicial review.

5. There is nothing unusual about this case, when compared to numerous other cases that may be heard by a DES officer prior to appeal to the Council. Nothing in the reference of this matter to Presiding Officer Walls was intended to substitute his decision for that of the Council. To bypass the Council at this point would set a bad precedent for future cases in which a DES officer initially hears the matter. Indeed, it would create a gap in the Council's

jurisdiction, including what may be among the most important cases presented to the Council for decision.

6. Even the legal issues in this case will benefit from the Council's consideration. For instance, one issue pressed by CFNH (and by no other party) is whether the Applicant satisfied the notice requirements of Env-Wm 303.05(d) ("If the applicant or owner of the facility owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) now owned by the applicant or facility site owner."). The Council will have the final say at the administrative level on what this regulation means – specifically whether it allows the Applicant to engage in the virtually meaningless exercise of notifying its own close corporate affiliates in situations where such affiliates own the abutting land, or whether the flexible term "owned" deals in the realities of beneficial ownership by the same corporate interest. In the latter case, the regulation requires notification of those who own the next parcel beyond parcels owned by the same overlapping corporate ownership, which include CFNH members. Likewise, interpretation of the rules governing applications for solid waste permits and modifications is also committed to the Council for the last word at the agency level. The Court should not be asked to perform the Council's role, or to assume how the Council would vote, on these points.

7. None of this means that what happened before Presiding Officer Walls will have to be "re-enacted before this Council", as the Applicant's Motion claims. The Council does not need to take additional testimony; if any additional testimony is needed, the Council should so decide and designate an appropriate person to hear it – most likely Presiding Officer Walls himself. It does mean that questions regarding what testimony should have been admitted, what discovery should have been allowed, and what conclusions should be drawn from the evidence already contained in the transcripts and exhibits, as a factual matter, are open for decision by the

Council. CFNH assumes that the Applicant does not want to “re-enact” the administrative proceeding before the Supreme Court, either. It would be wasteful to send this case to the Supreme Court, only to have it remanded to hear additional evidence or make additional discovery rulings that the Council could have ordered in the first instance.

8. In short, all the issues should be decided finally at the administrative level by the Council prior to judicial review, because the Council’s decision (a) may make it unnecessary to present certain issues to the Court, (b) may alter or affect the issues presented to the Court, (c) may result in a more complete record for judicial review, and (d) will preserve the Council’s authority to make such decisions instead of ceding them to the Court.

9. The Applicant itself made a very similar argument to the Merrimack Superior Court in related litigation that has been stayed pending resolution of this proceeding:

Following a decision by DES on an application for a solid waste permit, the aggrieved party may, by statute, appeal the decision to the **Waste Management Council**. See RSA 149-M:8; 21-O:9, V, 21-O:14. After a decision by the Council and the denial of a motion for rehearing, the party may appeal directly to the Supreme Court. See id. 21-O:14, III (providing that decisions of the Council may be appealed pursuant to RSA 541); id. 541:3; :6 (stating that appeals are taken to the Supreme Court); see also Appeal of Working on Waste, 133 N.H. 312 (1990)(considering citizen group’s RSA 541 appeal of decision of Waste Management Council that had affirmed DES’ modification of solid waste permit). **The Legislature provided that the appellate procedure established by RSA 541 is to be the exclusive remedy of parties aggrieved by orders of the DES as affirmed by the Waste Management Council.** See RSA 541:22.

Bio Energy, LLC’s and Regenesys Corp.’s Motion to Dismiss, November 22, 2004, p. 3 in Citizens for a Future New Hampshire v. Bio Energy, LLC, Regenesys Corp. and Michael P. Nolin as Commissioner, Merrimack County Superior Court No. 04-E-387 [emphasis added; discussing appeal of a grant of a solid waste permit]. Regenesys now suggests that the Council’s authority should apply only selectively. However, the law that Regenesys cited to the Merrimack County Superior Court applies just as much to applicants as it does to other parties.

10. The Applicant's citation to Supreme Court Rule 9<sup>2</sup> highlights additional defects in the Motion. For instance, the Motion only asks for "all legal issues" to be transferred. The Applicant has not provided "a statement of the question itself" [Supreme Court Rule 9(c)], without which it cannot obtain "the signature of the lower court or of the administrative agency **transferring the question**" [Supreme Court Rule 9(e)](emphasis added). The Council should not be asked to issue such a blank check for immediate judicial review of whatever issues the Applicant may later decide it wishes to present. Nor does the Supreme Court's rule contemplate a blank check.

11. The Applicant's Motion is nothing more than another attempt by it to circumvent statutory requirements that are inconvenient to its interests.

WHEREFORE, the Council should deny the Motion.

Respectfully submitted,

Citizens for a Future New Hampshire,  
By its attorneys

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Date: September 29, 2005

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<sup>2</sup> Supreme Court Rule 9(1) provides, in relevant part: "The interlocutory transfer statement shall contain (a) a list of all parties of record and their counsel, and the addresses of all parties and counsel; (b) a statement of the facts necessary to an understanding of the controlling question of law as determined by the transferring lower court or administrative agency, and a statement as to whether any transcript would be necessary to decide the question; (c) a statement of the question itself; (d) a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory transfer may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice; and (e) the signature of the lower court or of the administrative agency transferring the question."

**CERTIFICATION**

I hereby certify that a copy of the foregoing Opposition has on this 29<sup>th</sup> day of September, 2005 been forwarded, via first class mail, postage prepaid, to:

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